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October 7, 2016

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**BY HAND DELIVERY**

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OFFICE OF GENERAL  
COUNSEL

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FEDERAL ELECTION  
COMMISSION  
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**Re: MUR 7124**

Dear Mr. Jordan:

We write as counsel to Katie McGinty for Senate ("the Committee") and Roberta Golden, Treasurer, (collectively, "Respondents") in response to the Complaint filed by the Foundation for Accountability and Civic Trust on August 9, 2016 alleging a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") or Commission regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with WOMEN VOTE! and Majority Forward in connection with advertisements regarding the U.S. Senate race in Pennsylvania. The only factual basis for this allegation is the thematic similarity between information posted on the Committee's publicly available website and advertisements paid for by WOMEN VOTE! and Majority Forward. However, the Commission has made clear on numerous occasions that such activity does not constitute "coordination" for purposes of the Act. As the Complaint does not allege any additional facts to demonstrate that coordination took place, and because no coordination took place, the Commission should find no reason to believe that Respondents violated the Act and dismiss the Complaint.

**FACTUAL BACKGROUND**

The complaint alleges that the Committee is instructing organizations to run advertisements through "obscure postings" on its website. Compl. at 1. This is not true. The Committee posts numerous messages on its publicly available website and update those messages throughout the election cycle. With respect to the specific messages described in the Complaint, the first message referenced was posted in March 2016, and read:

At this point of the campaign, voters in Philadelphia and women all across the state of Pennsylvania need to know that Katie McGinty thinks too many families get the short end of the stick and unable to achieve economic security, while the special interests get

ahead. As the ninth of ten children and the daughter of a police officer who walked the beat and restaurant hostess, Katie McGinty is fighting to help everyday families, who have been ignored for too long. Katie McGinty is a problem solver who will create jobs, grow wages, and create opportunity.

The next message mentioned in the Complaint was posted in April 2016, and read:

Voters in Philadelphia and women across the Commonwealth of Pennsylvania still need to know the real Joe Sestak record. He supported a budget plan backed by Tea Party Republicans that would have cut Social Security and Medicare benefits, raised the Social Security retirement age to 69, and forced higher out-of-pocket spending for Medicare recipients.

The final message mentioned in the Complaint was posted in July 2016, and read:

Pennsylvania voters all across the state need to keep hearing a lot more about Pat Toomey and Wall Street. Wall Street's given Toomey \$2.7 million in contributions, and Toomey supported privatizing Social Security in the stock market. Sen. Toomey made millions as a Wall Street banker. Then he moved to Hong Kong, working for a billionaire Chinese investor. In Congress, Toomey carries Wall Street's water – voting to let banks continue their risky practices and opposing cracking down on Chinese currency manipulation. Toomey working for China has helped cost Pennsylvania more than one hundred and twenty thousand jobs.

Contrary to the Complaint's assertion that these were "obscure postings" on the Committee's website, in each case, the original message was posted on the Committee's home page, with a link to a separate page on the Committee's website containing more information. Any suggestion in the Complaint that messages posted on [www.katiemcginty.com](http://www.katiemcginty.com) were somehow "obscure" or "somewhat public" is meritless. These messages were part of the Committee's strategy to communicate information about Katie McGinty, or her opponent, to the general public.

According to publicly available information, WOMEN VOTE! did air two advertisements in Pennsylvania in April 2016. On April 5, 2016, WOMEN VOTE! began airing an advertisement entitled "Get," which included the following message:

Get up. Get to school. Get to work. Get by.

Katie McGinty knows the routine.

Her dad was a Philly cop, mom worked in a restaurant.

Then...hard work opened doors.

Now...it's not quite enough.

But McGinty's working to change that. Helping create thousands of new jobs.

She'll always stand up for manufacturing, higher wages, and equal pay for women.

So opportunity never gets out of reach.

Katie McGinty for Senate.<sup>1</sup>

There are some similarities between the message on the Committee's website at the time and the WOMEN VOTE! advertisement. They both include biographical information about Katie McGinty and her family. However, there are also significant differences between the Committee's message and the advertisement. The Committee's message mentions Katie McGinty's view that the special interests are getting ahead; the WOMEN VOTE! advertisement does not. The Committee's message also mentions that Katie McGinty is the ninth of ten children; the WOMEN VOTE! advertisement does not. Finally, the WOMEN VOTE! advertisement mentions that Katie McGinty will stand up for equal pay for women; the Committee's message does not.

Next, public reports indicate that on April 11, 2016, WOMEN VOTE! began airing an advertisement entitled "Spin," which included the following message:

For Senate, no spin . . . just facts.

Joe Sestak supports a plan that the New York Times reported makes cuts to Social Security benefits.

And the plan raises the retirement age. It's true. The AARP opposed the plan, citing dramatic cuts to Medicare benefits.

The plan Sestak supports means higher out of pocket costs for millions on Medicare.

Any way you spin it.

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<sup>1</sup> See WOMEN VOTE! Starts \$1 Million Program in Pennsylvania Senate Contest, *available at* <http://www.emilyslist.org/news/entry/women-vote-starts-1-million-program-in-pennsylvania-senate-contest>.

The truth about Sestak is gonna hurt.<sup>2</sup>

Again, there are some similarities between the message on the Committee's website at the time and the WOMEN VOTE! advertisement, as both discuss Joe Sestak's support for a plan that would cut Social Security and Medicare. However, there are also important distinctions. For example, the Committee's message discusses Joe Sestak's support for a plan backed by Tea Party Republicans; the advertisement makes no mention of Tea Party Republicans.

Finally, in late June, public reports indicate that Majority Forward began airing an advertisement entitled "Love Affair," which included the following message:

It's a love affair. Pat Toomey and Wall Street. Wall Street's given Toomey \$2.7 million dollars in contributions. And Toomey supported privatizing Social Security in the stock market. Wall Street would profit with hundreds of billions in fees, even if the market crashed and people lost everything. Pat Toomey, Wall Street. It may be love for them, but it's heartache for the rest of us.<sup>3</sup>

In this case, the Complaint itself acknowledges that the advertisement aired *prior* to any thematically similar message being posted on the Committee's website. But the Complaint does not even attempt to explain how the Committee's message could have informed the content of the advertisement that was already airing. And in addition, as was the case in each of the other advertisements described above, while there are some similarities, there are also significant differences between the Committee's message and the advertisement. For example, the Committee's message describes Senator Toomey's move to Hong Kong, his ties to a Chinese billionaire investor, and his voting record on Chinese currency manipulation; the advertisement does not mention any of these topics.

In the case of each advertisement, other than the partial similarities between the Committee's message and the advertisement run, the Complaint does not present any evidence of coordination between the Committee and the group that paid for the advertisement. And, in fact, there was no coordination. The Committee did not request or suggest that WOMEN VOTE! or Majority Forward create the advertisements; the Committee did not have any involvement in the creation, production, dissemination of the advertisements; and the Committee did not discuss with WOMEN VOTE! or Majority Forward the Committee's plans, projects, activities or needs.

<sup>2</sup> See WOMEN VOTE! Launches Ad Educating Pennsylvania Voters on Sestak's Record, available at <http://www.emilyslist.org/news/entry/women-vote-launches-ad-educating-pennsylvania-voters-on-sestaks-record>.

<sup>3</sup> See "Love Affair," available at <https://www.youtube.com/watch?v=T.vaw8piyZVY>.

## LEGAL ANALYSIS

### A. The Complaint Does Not Allege Facts Establishing that the Advertisements at Issue were Coordinated Communications

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong, and the conduct prong. The Complaint does not allege facts that demonstrate that the conduct prong was satisfied in connection with any of the advertisements identified. Further, the Complaint does not allege facts that demonstrate that the advertisements identified "republish" campaign materials.

#### 1. The Conduct Prong

The Complaint alleges that the advertisements at issue meet "several of the conduct prongs," but only includes a specific allegation that the "request or suggestion" prong was satisfied. Compl. at 6.<sup>4</sup> This assertion is simply incorrect as a matter of law. The Commission's regulations, and Commission's interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign's publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a "request of suggestion" that a third party disseminate a communication on its behalf. 11 C.F.R. § 109.21(d)(1). In the accompanying Explanation and Justification, the Commission clarified that "[t]he 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public general. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a selection audience and thereby satisfies the conduct standard in paragraph (d)(1)." Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). A request or suggestions made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that "[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that

<sup>4</sup> The Complaint alleges no facts that support a finding that the "material involvement" or "substantial discussion" standards of the conduct prong were satisfied. And, as the Complaint itself notes, each of these standards includes explicit language stating that it cannot be satisfied "if the information materials to the creation, production or distribution of the communication was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(2), (3).

information is subsequently used in connection with a communication.” Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

Most recently, the Commission re-affirmed this basic principle in response to a complaint with facts nearly identical to those presented in the Complaint. See MUR 6821. That complaint alleged that a coordinated communication occurred when Senate Majority PAC began to air an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”

Here, as was the case in MUR 6821, each message identified in the Complaint was posted on the publicly available website of the Committee. Accordingly, each posting alone cannot be a basis to find that any of the advertisements identified in the Complaint satisfied the conduct prong. And the Complaint does not allege any other facts to demonstrate that the conduct prong has been satisfied.

Further, in the case of the advertisement aired by Majority Forward, the message identified in the Complaint was posted *after* the advertisement had aired. It could not possibly have been the result of a request or suggestion made by the Committee. To the extent that the Complaint alleges that the posting of the message by the Committee was a request for Majority Forward to continue airing the advertisement, that allegation is unsupported by any facts. And even if such facts were presented, as the alleged request was made on the Committee’s publicly available website, the conduct prong could not be satisfied.

## 2. Republication

The Complaint also alleges that the advertisements at issue constituted republication of campaign materials, and therefore a coordinated communication. Republication of campaign materials requires the “dissemination, distribution, or republication, in whole or in part, of any . . . written, graphic, or other form of campaign materials.” 11 C.F.R. § 109.23(a). There is a specific exception to this standard when the “campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.” 11 C.F.R. §§ 109.21(c)(2); 109.23(b)(4).

The advertisements at issue here simply did not republish campaign materials, a fact which the Complaint itself readily admits with respect to the WOMEN VOTE! advertisements. Compl. at 7. The significant differences described above between the messages posted by the Committee

on its publicly available website and the advertisements aired by WOMEN VOTE! confirm this fact to be true.

With respect to the Majority Forward advertisement, the Complaint acknowledges that the advertisement was already on the air before the Committee's message was even posted. This acknowledgment is fatal to the allegations that the advertisement republished campaign materials; there were no campaign materials identified in the Complaint that could have been republished when the advertisement aired.

Further, the Commission has consistently found that the incorporation of publicly available information into a third party's advertisement does not amount to "republishing." In one MUR, then-Commissioner Josefiak explained:

[T]he Commission regulations cited do not 'prohibit' gaining information or researching ideas from campaign materials for use in entirely new communications. The regulations do not convert independent expenditures for those communications into contributions based upon a similarity or even identity of themes with the campaign effort. Ideas and information can come from many sources, and their commonality is of itself insufficient to demonstrate either coordination or 'copying.'

MUR 2272, Statement of Reasons of Commissioner Josefiak at 8. Similarly, in MUR 6821, the Commission noted "[a]lthough the Shaheen Committee website message and the SMP advertisement share similar themes," that "alone is not enough to suggest coordination." Moreover, the Commission has explained that thematic similarities between a third party advertisement and campaign materials are "reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination." See MUR 5669, Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner at 5. There is no indication of such prior coordination presented here, and no inclusion of campaign materials of the Committee that could trigger the Act's republication provision.

As was the case in MUR 6821, the messages posted on the Committee's website cover several topics that are not addressed in the advertisements identified in the Complaint. Further, the advertisements contain well-known information about Katie McGinty or her opponents. It is therefore no surprise that such information was employed by the Committee on its website and WOMEN VOTE! and Majority Forward in their advertisements. The mere fact that each entity chose to discuss similar issues in its own messaging plainly does not amount to republication.

Jeff S. Jordan, Esq  
October 7, 2016  
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**B. The Commission Must Reject the Complaint's Request for an Investigation**

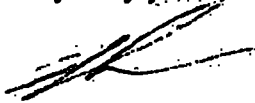
Notwithstanding that it fails to allege specific facts showing a violation of the Act or Commission regulations, the Complaint requests an investigation to determine whether there was, in fact, coordination between the Committee and WOMEN VOTE! and Majority Forward. The Act does not allow the Commission to engage in such a fishing expedition.

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The Act requires the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). In turn, the Commission may find "reason to believe" only if a complaint sets forth specific un rebutted facts, which, if proven true, would constitute a violation of the Act. See 11 C.F.R. § 111.4(a), (d); MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *Id.*

The Complaint does not set forth sufficient specific un rebutted facts, which, if proven true, would constitute a violation of the Act. For the reasons set forth herein, the specific facts that it does allege - that the Committee posted the messages on its publicly available website and that WOMEN VOTE! and Majority Forward aired advertisements in Pennsylvania with thematic similarities - do not constitute a violation of the Act.

The Commission must therefore reject the Complaint's request for an investigation. It should instead dismiss the Complaint and close the file.

Very truly yours,



Marc Erik Elias

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